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No. 00-1359

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

NEW HORIZON OF NEW YORK, LLC,

Petitioner,

v.

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E.J. SERVICING, INC.; E.J. REALTY MANAGEMENT CORP.; E.J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INC.; IRA BORN; STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of HOWARD ROSEN, M.D.; and RUTH SCHARF,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTION

The Fourth Circuit observed that petitioner initiated and pursued this lawsuit in a United States District Court on the legal theory that "this case was related to cases arising under Title 11." Pet. App. at 13. With respect to jurisdiction, petitioner's complaint alleged only that the district court had jurisdiction over claims based on North Carolina state law under 28 U.S.C. § 1334(b), which confers federal jurisdiction over all "civil proceedings arising under Title 11, or arising or related to cases under Title 11."[1] Whether the petitioner's state-law claims were or were not "related" to a case under Title 11 was the primary jurisdictional issue in the district court and in the court of appeals.

The respondents moved on October 23, 1998, ten days before trial, to dismiss the action for lack of federal subject-matter jurisdiction, and the petitioner, in response, relied primarily on the language of Section 1334(b). Petitioner contended that its claims arose out of and were related to a proceeding under Title 11.

Following the entry of a final judgment, the respondents appealed and the Fourth Circuit, applying its own binding precedent in *In re Celotex Corp.*, 124 F. 3d 619, 625 (4th Cir. 1997), and this Court's language in *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-308 (1995), held that there was no federal subject-matter jurisdiction under 28 U.S.C. § 1334(b) on the unique facts of this case. *See* Pet. App. at 14-24. The court of appeals rejected petitioner's contention that the possibility that the respondents were in civil contempt of a bankruptcy court order gave rise to "related to" jurisdiction under Section 1334(b). Pet. App. at 17-22. The Fourth Circuit held that such a civil contempt claim would constitute an impermissible collateral attack on an unappealed order of the bankruptcy court. Hence it could

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[1] Paragraph 16 of the complaint stated: "This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, as this matter is related to proceedings under Title 11 of the United States Code."

not be the basis for civil claims based on state law in federal court under Section 1334(b). Pet. App. at 19-22. The court of appeals also rejected the other grounds asserted by the petitioner for federal jurisdiction under Section 1334(b). Pet. App. at 22-24.

The primary argument now made in the Petition for a Writ of Certiorari -- i.e., that federal subject-matter jurisdiction existed because this action was, in substance, an action under 18 U.S.C. § 401 "to determine the appropriate remedy for violation of the Confirmed Order" (Pet. 15), and that federal-court jurisdiction over the claims made under North Carolina law is "supplemental" to that contempt action under 28 U.S.C. § 1367 (Pet. 16) -- was not urged in the lower courts. It is a recent formulation of a legal issue designed to generate some interest in this Court. In fact, as we demonstrate below, there is no more merit to this asserted ground for federal jurisdiction than there is to the Section 1334(b) grounds that the petitioner invoked unsuccessfully in the district court and in the court of appeals. But even if this newly crafted issue did present grounds for certiorari, the failure to assert it below forecloses its consideration by this Court at this juncture. *Holly Farms Corp. v. National Labor Relations Board*, 517 U.S. 392, 400 n.7 (1996); *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 379 (1996).

STATEMENT

Petitioner ("New Horizon") is a limited liability corporation owned by two families and created in 1996 for the purpose of exercising an option under a bankruptcy court reorganization plan. The option was to purchase certain notes relating to apartment properties in Durham, North Carolina, owned by a limited partnership. New Horizon brought the present action in federal court after it exercised the option but did not close on the sale. It sought millions of dollars in damages against certain limited partners who had allegedly interfered with its ability to exercise the option by

appealing to a district court from the bankruptcy court's approval of the reorganization plan that included the option.

The limited partners who were sued by New Horizon -- who are respondents in this Court -- claimed, *inter alia*, that their appeal to the district court was objectively valid and was, therefore, constitutionally shielded against damage liability by the *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight Co.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 743 (1983).

The district court denied pretrial motions for summary judgment and to dismiss the complaint for lack of federal subject-matter jurisdiction. The case proceeded to trial before a jury on various North Carolina breach-of-contract and tort claims growing out of New Horizon's alleged inability to exercise the option. The jury returned a verdict awarding compensatory damages of $6,491,835. The award was trebled under the North Carolina unfair and deceptive trade practice law for a total in excess of $22 million.

On appeal, the Fourth Circuit held that there was no federal subject-matter jurisdiction over New Horizon's claims because even if New Horizon's claim is related "in the ordinary sense of the word" (Pet. App. at 15, n.16) to the bankruptcy proceedings in the Eastern District of North Carolina, the claims did not "conceivably have any effect on the estate being administered in bankruptcy," as is required under this Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995), to create federal subject-matter jurisdiction. Pet. App. at 15. The damage judgment was therefore vacated by the court of appeals because the court below concluded that the "outcome" of New Horizon's complaint could not "alter the debtor's rights, liabilities, options or freedom of action (positively or negatively)" and the petitioner's claims did not "impact upon the handling and

administration of the bankrupt estate." Id. After the Fourth Circuit's decision, New Horizon initiated a substantially identical action in the North Carolina state courts. *New Horizon of NY LLC v. Elliot Jacobs, et al.*, General Court of Justice, Superior Court Division, Durham County, N.C., No. 00-CVS-05182.

REASONS FOR DENYING THE WRIT

I.

THE PRIMARY ISSUE NOW URGED BY THE PETITIONER WAS NOT PRESENTED TO OR DECIDED BY THE LOWER FEDERAL COURTS

The first question presented in the petition is based on the "district court's federal question jurisdiction over a claim for contempt of court." The petition asserts that the North Carolina contract and tort claims made by New Horizon in the United States District Court for the Eastern District of North Carolina were within the subject-matter jurisdiction of the federal court because they were "supplemental" or "pendent" to the "claim for contempt of court." Pet. at 15-17. This is a substantial reconfiguration and revision of the jurisdictional ground asserted by New Horizon in the lower courts.

The New Horizon complaint invoked federal subject-matter jurisdiction solely under 28 U.S.C. § 1334(b), on the alleged ground that New Horizon's claims were "related" to proceedings under Title 11. See note 1, *supra*; Pet. App. at 14. To be sure, New Horizon also alleged in paragraphs 53-55 of its complaint that the actions of the defendants constituted "contempt of the United States Bankruptcy Court through the knowing, willful and contumacious violation" of the order entered by the bankruptcy court confirming the reorganization plan. That same order had, according to the complaint, been tortiously appealed to the district court. The

civil contempt was not alleged, however, to be the basis for federal subject-matter jurisdiction. It was only alleged as grounds for additional penalties or sanctions against the respondents.

The district judge ruled on the civil contempt claim after the jury returned its verdict on the state-law claims, and he rejected the civil contempt claim. Pet. App. at 28-34. New Horizon did not appeal from that ruling.

The first ground asserted by the respondents in their appeal to the Fourth Circuit was that the federal court lacked subject-matter jurisdiction. New Horizon gave the jurisdictional issue short shrift in its brief in the court of appeals. It asserted in its brief that "federal subject-matter jurisdiction over this case cannot reasonably be disputed." Brief for Appellee, 4th Cir. Nos. 99-1990, 99-1996, p. 70. The argument made in New Horizon's brief related only to Section 1334(b). New Horizon argued that the case "presents numerous questions of bankruptcy and federal law." *Id.* at p. 71. New Horizon did not argue -- and the Fourth Circuit did not decide -- the "supplemental" or "pendent" jurisdiction issue that is now being asserted for the first time in New Horizon's petition for a writ of certiorari.

The opinion of the court of appeals also demonstrates that "supplemental" or "pendent" jurisdiction over state claims was never argued to the court of appeals. The Fourth Circuit describes the relevance of New Horizon's civil contempt claim to its jurisdictional argument as follows (Pet. App. at 19; emphasis added):

> Thus, it is patent that the civil contempt count, *on which New Horizon bases its claim in this case of related to jurisdiction under § 1334*, is nothing more than a collateral attack on the order of the bankruptcy court of February 6, 1997.

The court of appeals did not discern in New Horizon's arguments any contention that there was "supplemental" or

"pendent" jurisdiction over North Carolina state-law claims growing out of the allegations of civil contempt. The only relevance of the civil contempt allegations was as a basis for "related to jurisdiction under § 1334." Pet. App. at 19.

Under long-standing principles articulated by this Court governing the grant of certiorari, legal issues that have not been argued or decided by the lower federal courts are not properly before this Court. *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Ortiz*, 422 U.S. 891, 898 (1975).

II.

THE RESULT REACHED BY THE FOURTH CIRCUIT IS CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER CIRCUIT

A. The First Question Presented

As indicated above, the first question presented in the Petition for Certiorari was never raised or decided below. In any event, the position urged by New Horizon is erroneous. New Horizon acknowledges that "[t]he district court ultimately ruled against Horizon on the contempt of court claim." Pet. at 15. But it argues that the mere inclusion of this claim in its complaint justified a full jury trial in a federal court on various state claims on the basis of "supplemental" or "pendent" jurisdiction.

New Horizon does not take issue, however, with the conclusion of the district court (Pet. App. at 28-34) that rejected New Horizon's civil contempt claim. The district court concluded that there was no violation by the respondents of any "specific and definite order." Pet. App. at 32. New Horizon did not appeal that decision. And the court of appeals also noted that the order of the bankruptcy court dated February 6, 1997 -- which had initially denied

New Horizon's motion to hold the respondents in contempt (Pet. App. at 11, 18) -- had also not been appealed. New Horizon's federal-court lawsuit was, therefore, "a collateral attack on a final order of the bankruptcy court." Pet. App. at 17. Hence the Fourth Circuit correctly concluded "that the jurisdictional base for the case should not be permitted to stand on a collateral attack which has been forbidden by two decisions of the Supreme Court." Pet. App. at 18.

The petition does not contend -- nor could it -- that given the rejection of New Horizon's civil contempt claim, there was any "judicial economy" or preservation of judicial resources in trying the state-law claims in a federal court. This is particularly true since the damage claims were to be tried to a jury and the civil contempt claim was to be tried to a judge. The petition argues only that the Fourth Circuit's decision in this case is inconsistent with other decisions of the Fourth Circuit. *See* Pet. at 16-17. An intra-circuit split of this kind is not a ground for the exercise of this Court's certiorari jurisdiction. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957); *see also Davis v. United States,* 417 U.S. 333, 340 (1974).

B. The Second Question Presented

The court below held that New Horizon's claims were not "related to a bankruptcy case" within the meaning of 28 U.S.C. § 1334(b) because the term "related" in this jurisdictional provision is limited to situations in which the "outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." Pet. App. at 15, 22, quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), approved by this Court in *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995). Since New Horizon was not a debtor or creditor in the bankruptcy proceedings and was not seeking enforcement of any order that would enlarge or diminish the bankrupts' estates, its

lawsuit did not qualify under the "related to" provision of 28 U.S. C. § 1334(b). As the Fourth Circuit observed, the New Horizon claims were "completely unrelated to the sale of the wrap notes or the administration of the bankruptcy estates." Pet. App. at 23. The damages that were awarded by the jury were to be paid by individuals who were not debtors or creditors in the bankruptcies and the putative recovery would not benefit either bankrupt estate. By the time New Horizon filed its case, the notes were no longer even possessed by either bankrupt estate. Nor could the verdict in New Horizon's case have affected the notes or their ownership in view of the nature of New Horizon's claims. In these circumstances, New Horizon's claims were not within the subject-matter jurisdiction of the federal court under Section 1334(b).

The petition does not state or suggest that the Fourth Circuit's decision on this issue conflicts with a decision of this Court or of any other Circuit. Indeed, the result reached by the court below is patently mandated by this Court's *Celotex* decision and by the Third Circuit's holding in *Pacor*, which has been universally followed.

Moreover, the Fourth Circuit's decision follows a long line of precedent. Courts considering this jurisdictional issue have consistently held that the "related to" language of Section 1334(b) is not satisfied if a judgment could not affect the bankrupt's estate. In *Matter of Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987), for example, Circuit Judge Easterbrook wrote for a unanimous panel that the "related to" jurisdiction of Section 1334(b) may be invoked only when the dispute "affects the amount of property available for distribution or the allocation of property among creditors." The Court of Appeals for the Eleventh Circuit observed in *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 789 (11th Cir. 1990), that "[o]verlap between the bankrupt's affairs and another dispute is insufficient unless its resolution also affects the bankrupt's estate or the allocation of assets among creditors." *See also Specialty Mills, Inc. v. Citizens*

State Bank, 51 F.3d 770 (8th Cir. 1995) (no federal jurisdiction even though the state-law claims "arose from [the defendant's] conduct in the Dakota Oat bankruptcy"); *In re Dow Corning Corp.*, 86 F.3d 482, 492 (6th Cir. 1996); *Matter of Zale Corp.*, 62 F.3d 746, 752 (5th Cir. 1995); *Matter of Wood*, 825 F.2d 90, 93 (5th Cir. 1987); *In re JMP–Newcor International, Inc.*, 225 B.R. 457 (Bankr. N.D. Ill. 1998); *In re Import & Mini Car Parts, Ltd.*, 200 B.R. 857 (Bankr. N.D. Ind. 1996); *In re Leeds Building Products, Inc.*, 160 B.R. 689 (Bankr. N.D. Ga. 1993); *In re Annapolis Mall Motel Ltd. Partnership*, 140 B.R. 105, 107 (N.D. Md. 1991).

The petition asserts erroneously that the federal court had subject-matter jurisdiction when the case was commenced, and it argues that subsequent events did not divest the federal court of such jurisdiction. Pet. at 19. But from its inception, the action brought by New Horizon for damages could not affect the allocation of property among creditors or the size of the bankrupt estates. The events recited in the Fourth Circuit's opinion that occurred after inception of New Horizon's action were not invoked as a ground to withdraw federal subject-matter jurisdiction that had previously attached. They were described only to demonstrate that the events that actually transpired proved what was obvious from the face of New Horizon's complaint -- i.e., that the claims made in the complaint would not enlarge or diminish the bankrupt estates.

III

THIS CASE PRESENTS NO RECURRING ISSUE OF IMPORTANCE

Finally, the petition does not describe how the jurisdictional issue presented by the unique circumstances of this case could affect other situations. To our knowledge, this is the first recorded case of an action brought in any court seeking to hold parties liable for appealing a bankruptcy court decision to a district court. Such an appeal is ordinarily a constitutional and statutory right that cannot give rise to civil liability. *See* p. 4, *supra*. Petitioner does not contend that there are likely to be many such cases. Indeed, the issue that the Fourth Circuit did not reach and that is presently pending in the North Carolina state court -- i.e., whether civil liability may constitutionally attach to the pursuit of an objectively valid appeal -- should, in most if not all cases, prevent a recurrence of the claim that was made here by New Horizon. And, in any event, petitioner has now filed its claim in the North Carolina state courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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